STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
AND THE WORKERS' COMPENSATION APPELLATE COMMISSION

SCOTT M. CAIN,
SS# 379-74-1682

Plaintiff-Appellant,

Supreme Court No.: 125 111
Court of Appeals No.: 2212104
Appellate Commission No.: 29-0390

-vs-

WASTE MANAGEMENT INC. and
TRANSPORTATION INSURANCE COMPANY

ORAL ARGUMENT REQUESTED

Defendants-Appellants,

and

SECOND INJURY FUND/TOTAL AND
PERMANENT DISABILITY PROVISION,

Defendants-Appellant.

DEFENDANT-APPELLANT WASTE MANAGEMENT AND TRANSPORTATION INSURANCE COMPANY'S BRIEF ON APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by failing to rule that there is not a statutory basis for "specific loss" claims under "loss of industrial use" theory?

Defendant-Appellant says, "yes."

It is unknown what position Plaintiff and defendant Second Injury Fund/Total and Permanent Disability Provision will take with regard to this issue.

2. Whether the Court of Appeals erred by failing to recognize this Court's ruling that the broad nature and special purpose of "loss of industrial use" claims has required the imposition of certain limitations or requirements, and to the extent that concepts of "loss of industrial use" have been exported to "specific loss" claims, the restrictions imposed on the exported doctrine must likewise be imposed?

Defendant-Appellant says, "yes."

It is unknown what position Plaintiff and defendant Second Injury Fund/Total and Permanent Disability Provision will take with regard to this issue.

3. Whether the Court of Appeals must be reversed as Plaintiff fails to meet the statutory test for a specific loss of his left leg (anatomic loss or its equivalent), and Plaintiff's claims for the specific loss of his leg under a "loss of industrial use" theory are misplaced given the rules established by this Court's prior *Cain* opinion?

Defendant-Appellant says, "yes."

It is unknown what position Plaintiff and defendant Second Injury Fund/Total and Permanent Disability Provision will take with regard to this issue.

4. Whether the "loss of industrial use" standard may be applied to claims of specific loss under MCL 418.361(2)?

Defendant-Appellant says, "no."

It is unknown what position Plaintiff and defendant Second Injury Fund/Total and Permanent Disability Provision will take with regard to this issue.

5. Whether *Pipe v. Leese Tool and Die Co.*, Mich 510 (1981), should be overruled?

Defendant-Appellant says, "yes."

It is unknown what position Plaintiff and defendant Second Injury Fund/Total and Permanent Disability Provision will take with regard to this issue.

6. Whether the WCAC exceeded the scope of this court's Remand order by awarding

Plaintiff total and permanent disability benefits?

Defendant-Appellant says, "yes."

It is unknown what position Plaintiff and defendant Second Injury Fund/Total and Permanent Disability Provision will take with regard to this issue.

7. Whether total and permanent disability benefits under MCL 418.361(c)(b) (loss of both legs) may be awarded on the basis of Plaintiff's specific (anatomical) loss of one leg and his specific (industrial use) loss of the other leg?

Defendant-Appellant says, "no."

It is unknown what position Plaintiff and defendant Second Injury Fund/Total and Permanent Disability Provision will take with regard to this issue.

ORDER APPEALED FROM AND RELIEF SOUGHT

Defendant Appellant Waste Management, Inc. and Transportation Insurance Company appeals from the order of the Michigan Court of Appeals dated November 6, 2003. (See Appendix, Page 62a). Defendants ask this Court to reverse the decision of the Michigan Court of Appeals and to further rule that for the reasons previously stated by this Court and for the reasons stated herein, that Plaintiff-Appellee is not entitled to total and permanent disability benefits.

GROUNDS FOR APPEAL

The issues presented in this appeal involve legal principles of major significance to the state's jurisprudence as identified in MCR 7.302(B)(3). Furthermore, as stated in MCR 7.302(B)(5), the decision of the Court of Appeals is clearly erroneous and will cause material injustice. Simply put, the Court of Appeals adopted the erroneous legal analysis of the Workers' Compensation Appellate Commission following the remand of this matter by this Court's decision dated January 23, 2002. Its holding, if allowed to stand, erodes the distinctions between specific loss claims and total and permanent disability claims as set forth in this Court's prior decision as referenced above and sets forth an incorrect rule of law.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

This Court accurately summarized the factual background and procedural background of this case in its prior decision, *Cain v. Waste Management, Inc.*, 465 Mich 509; 638 NW2d 98 (2002). While a summary of this Court's factual and procedural background follows, it is appropriate to note that as part of this Court's decision, this matter was remanded to the Appellate Commission for further determinations consistent with this Court's opinion, and after the Appellate Commission issued it's decision, the Defendants sought leave to appeal to the Michigan Court of Appeals. The Michigan Court of Appeals affirmed the Appellate Commission, and Defendants bring their appeal to this Court. The decisions of the Court of Appeals and the Appellate Commission appear at Appendix page 38a and 27a, respectively.

In August 1992, Cain filed a petition with the Bureau of Workers' Disability Compensation, seeking total and permanent disability benefits which stated:

> My legs were crushed in a motor vehicle accident resulting in an amputation above the knee of my right leg. The severity of my injuries to my left leg result [sic] in the industrial loss of us of both legs. I am, therefore, entitled to permanent and total disability benefits.

At the end of the second day of the hearing, Mr. Cain moved to amend his petition to include a claim for the specific loss of his left leg *Cain*, supra, at 514. The magistrate denied the motion Id. Less than a week later, Mr. Cain filed a petition requesting benefits for the specific loss of the leg:

> In addition to my initial application, I am claiming specific loss of my left lower extremity for dates of injury of 10/25/88 and 10/21/90, while walking dawn a ramp at home, I re-fractured my left tibia causing it to become necessary for me to wear a permanent brace on my left leg.

In December of 1993, the magistrate awarded specific loss benefits (to be paid consecutively) for the loss of both legs. *Cain*, supra, at 515. Although he had denied the motion to add a claim for the specific loss of the left leg, the magistrate nonetheless awarded the benefits, reasoning that Mr. Cain's assertion of the loss of the industrial use of both legs implicitly included a claim for the specific loss of the left leg (see Magistrate Anderson's 1993 opinion, at Appendix 3a). The magistrate found that the left leg had been effectively lost in October 1990, when the stress fracture occurred and "any hope of restoring the member was abandoned." *Id.* The Magistrate stated:

> The condition of the Plaintiff's left leg subsequent to 10/21/90 appears to be tantamount to amputation. He cannot support himself without the brace which was fashioned for him. The Plaintiff is in effect wearing a prosthetic device on the left leg *Id.*

Thus, he ruled that the Second Injury Fund would be obligated to pay benefits for total and permanent disability because Mr. Cain had lost the industrial use of both legs.[3] *Id.* Appendix page 5.

Waste Management and its insurer appealed to the Appellate Commission and they reversed the judgment of the magistrate in April of 1997. The WCAC ruled that, in light of the phrasing of Mr. Cain's initial petition to the bureau, the magistrate had erred in awarding benefits for the specific loss of the left leg. *Cain v Waste Management, Inc.* and the Second Injury Fund, 1997 opinion # 249, Appendix page 5. The WCAC also held that the magistrate had committed legal error in his analysis of the total and permanent disability claim, since he had failed to use a "corrected" standard to examine the remaining usefulness of Mr. Cain's *braced* leg. *Id.* Appendix page 5. Applying such a standard, the WCAC concluded that Mr. Cain was not totally and permanently disabled. *Id.*

In May 2000, the Court of Appeals affirmed in part, reversed in part, vacated in part, and remanded for further proceedings.[4] The Court of Appeals affirmed the WCAC's denial of specific loss benefits, agreeing that Mr. Cain's petition did not state the claim for such benefits. Opinion of the Michigan Court of Appeals dated May 2, 2000. Appendix page 38a.

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[3]Total and permanent disability, compensation for which is provided in MCL§ 418.351, means: (g) Permanent and total loss of industrial use of both lets or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury. [MCL 418.361(3)]

[4]When Mr. Cain first applied for leave to appeal, his application was denied by the Court of Appeals. Unpublished order, entered August 7, 1997(Docket No. 203539). However, this Court remanded the case for consideration as on leave granted. 459 Mich. 863, 586 N.W.2d 87 (1998). The Court of Appeals decision was unpublished opinion per curium, issued May 2, 2000 (Docket No. 214445)

However, the Court of Appeals reversed and vacated with regard to the finding of total and permanent disability, stating:

> We reverse that portion of the WCAC's decision which holds that a claim for [total and permanent] disability benefits must be analyzed under the corrected test. While use of the corrected test is mandated in vision case, [*Hakala v. Burroughs Corp. (After Remand)*, 417 Mich 359, 338 NW2d 165 (1983)], and has been expanded to cases involving implants, [*O'Connor v. Binney Auto Parts*, 203 Mich App 522, 513 NW2d 818 (1994)], its use has not been extended to cases involving prosthetics or braces. In the instant case, plaintiff wears a prosthetic right leg and a brace on his left leg. The brace is not permanently attached to plaintiff's leg. In holding that use of the corrected test was required in this case, the WCAC read *Hakala, supra,* and *O'Connor, supra,* too broadly.
>
> The issue whether a claimant has suffered loss of industrial use is one of fact. *Pipe v. Leese Tool & Die Co.*, 410 Mich 510, 527,301 NW2d 526 (1981). We hold that the WCAC exceeded its authority by applying the corrected test to make initial findings of fact regarding whether plaintiff has suffered the loss of industrial use of his legs. Such initial findings are within the exclusive province of the magistrate. [*Layman v. Newkirk Electric Associates, Inc.*, 458 Mich 494, 581 NW2d 244 (1998)]. We vacate that portion of the WCAC's decision denying plaintiff's claim for [total and permanent] disability benefits and remand with instructions that the WCAC apply the uncorrected test to plaintiff's claim. If necessary, The WCAC may further remand the case to the magistrate for additional findings of fact *Id.;* MCL 418.861a(12); MSA 17.237(861a)(12). *Id.*

Applications for leave to appeal were filed by Waste Management, Inc., and the Second Injury Fund. Mr. Cain responded with an application for leave to appeal as cross-appellant. The Michigan Supreme Court granted all three applications and invited *amicus curiae* participation.

The Michigan Supreme Court issued its opinion on January 23, 2002. Appendix page 41a. In short, the court ruled that the "corrected test" was proper for claims of total and permanent disability for loss of industrial use under MCL 418.361(3)(g). The court

distinguished specific loss claims from loss of industrial use claims. The court remanded for a determination of whether Plaintiff had suffered the specific loss of his left leg.

The Appellate Commission determined that plaintiff had suffered the specific loss of his left leg, and subsequently the Defendant sought leave to appeal to the Michigan Court of Appeals. After the Michigan Court of Appeals affirmed the Appellate Commission's determination, Defendant sought leave to this Court. Leave was granted on June 3, 2004.

STANDARD OF REVIEW

Questions of law are reviewed de novo. *Layman v. Newkirk Electric Associates, Inc.* 458 Mich 494, 581 NW2d 244 (1998). Error may be committed by basing a findings of fact on a misconception of law and by failing to correctly apply the law to the finding fact. *Braxton v. Chevrolet Gray Iron*, 396 Mich 685, 692-603; 242 NW2d 420 (1976); *Pulver v. Dundee Cement Company*, 445 Mich 68, 87; 515 NW2d 728 (1994) (*Riley, J. dissenting).*

ARGUMENT

It is undisputed that plaintiff has suffered injuries to both of his legs, including injuries that resulted in the amputation of his right leg above the knee. However, it is equally undisputed that Plaintiff's left leg was not amputated, and that he has an anatomically complete left leg.

This Court previously remanded this matter to the Appellate Commission for a determination on Plaintiff's claim that he has suffered the specific loss of his left leg, his anatomically complete leg. Notwithstanding the fact that this Court carefully distinguished the concepts of total and permanent disability (and its unique "loss of industrial use" standard)

and specific loss claims, the Appellate Commission and the Court of Appeals applied improper standards in their consideration of the Plaintiff's claim for the specific loss of his left leg. Reversal is appropriate.

Both the Appellate Commission and the Court of Appeals erred by applying standards that are only applicable to claims for "loss of industrial use" and by doing so were able to reach the conclusion that Plaintiff suffered the specific loss of his left leg. Even to the extent that concepts of "loss of industrial use" may properly be extended to "specific loss" claims, this Court's directive was ignored, and the lower courts failed to apply the limitations or requirements that must be imposed upon claims based on a so-called "loss of industrial use."

I. GENERAL ARGUMENTS DICTATING REVERSAL OF THE OPINIONS OF THE MICHIGAN COURT OF APPEALS AND THE APPELLATE COMMISSION FOLLOWING THIS COURT'S REMAND.

A. WHETHER THE COURT OF APPEALS ERRED BY FAILING TO RULE THAT THERE IS NOT A STATUTORY BASIS FOR "SPECIFIC LOSS" CLAIMS UNDER A SO-CALLED "LOSS OF INDUSTRIAL USE" THEORY.

Section 361(2) of the Workers' Disability Compensation Act defines "scheduled losses," also referred to as "specific losses." Claims for a specific loss provide for a fixed amount of benefits that are recovered notwithstanding the worker's actual earnings. Specific loss claims compensate injured workers for anatomical losses. Section 361(3) provides for total and permanent disability. Subsection 3 provides in its entirety as follows:

> (3) Total and permanent disability, compensation for which is provided in § 351 means:
>
> (a) Total and permanent loss of sight of both eyes.
>
> (b) Loss of both legs or both feet at or above the ankle.
>
> (c) Loss of both arms or both hands at or above the wrist.

(d) Loss of any two of the members or facilities in subdivisions (a), (b), or (c).
(e) Permanent and complete paralysis of both legs or both arms or of one leg and one arm.
(f) Incurable insanity or imbecility.
(g) Permanent and total loss of industrial use of both legs or both hands or both arms or one leg and one arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury.

The nomenclature "loss of industrial use" occurs only in subpart (g) of § 361(3). The legislative history of this subsection was described by the Appellate Commission's decision of April 24, 1997, as well the historical legal opinions and its significance from a policy perspective. The statutory basis for "specific loss" claims, or more accurately "scheduled losses," is found in § 361(2):

> (2) In cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:
>
> (a) Thumb, 65 weeks.
> (b) First finger, 38 weeks.
> (c) Second finger, 33 weeks.
> (d) Third finger, 22 weeks.
> (e) Fourth finger, 16 weeks.
> The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of ½ of that thumb or finger, and compensation shall be ½ of the amount above specified.
> The loss of more than 1 phalange shall be considered as the loss of the entire finger or thumb. The amount received for more than 1 finger shall not exceed the amount provided in this schedule for the loss of a hand.
> (f) Great toe, 33 weeks.
> (g) A toe other than the great toe, 11 weeks.
> The loss of the first phalange of any toe shall be considered to be equal to the loss of ½ of that toe, and compensation shall be ½ of the amount above specified.

> The loss of more than 1 phalange shall be considered as the loss of the entire toe.
> (h) Hand, 215 weeks.
> (I) Arm, 269 weeks.
> An amputation between the elbow and wrist that is 6 or more inches below the elbow shall be considered a hand, and an amputation above that point shall be considered an arm.
> (j) Foot, 162 weeks.
> (k) Leg, 215 weeks.
> An amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg.
> (l) Eye, 162 weeks. Eighty percent loss of vision of 1 eye shall constitute the total loss of that eye.

While legislature used the phrase "loss of the industrial use" in sub-section 361(3)(g) to describe the type of disability that gives rise to compensation under Section 351 of the Act, the phrase "loss of industrial use" is conspicuously absent in sub-section 361(2). There is not a single reference to loss of industrial use in Section 361(2). Where judicially created exceptions to general statutory law are arguably inconsistent with the plain language of the Act, the judicial pronouncement should be interpreted more narrowly than more broadly in those cases in which the scope of the judicial doctrine is uncertain. *Herbolsheimer v SMS Holding Co., Inc.*, 239 Mich App 235; 608 NW2d 487 (2000). Simply stated, there is no statutory basis for a loss of industrial use claim when proceeding under Section 361(2). The Court of Appeals failure to so recognize was clearly erroneous.

B. WHETHER THE COURT OF APPEALS ERRED BY FAILING TO RECOGNIZE THIS COURT'S RULING THAT THE BROAD NATURE AND SPECIAL PURPOSE OF "LOSS OF INDUSTRIAL USE" CLAIMS HAS REQUIRED THE IMPOSITION OF CERTAIN LIMITATIONS OR REQUIREMENTS, AND TO THE EXTENT THAT CONCEPTS OF "LOSS OF INDUSTRIAL USE" HAVE BEEN EXPORTED TO "SPECIFIC LOSS" CLAIMS, WHETHER THE RESTRICTIONS IMPOSED ON THE EXPORTED DOCTRINE MUST LIKEWISE BE IMPOSED.

Michigan courts initially struggled with the scope of claims for the "loss of industrial use." First consider the decision of *Burke v. Ontonagon Co. Road Commission*, 391 Mich 103, 214 NW2d 797 (1974). *Burke* highlighted the broad nature of a loss of industrial use claim, finding that such a claim can be established without direct injury to both or either legs. *Id.*, at 107. As set forth at page 114 of that decision, industrial loss of use claims are indeed much broader than specific loss or scheduled loss claims. The sweeping language of *Burke* made the decision of *Triplett v. Chrysler Corp.*, 394 Mich 518; 232 NW2d 168 (1975), necessary. The decision in *Triplett* recognized that given the broad wording of *Burke*, any general debilitating disease could establish a claim for loss of industrial use of the legs, clearly an improper result. The decision of *Triplett* brought the concept of loss of industrial use back into context, focusing on injuries rather than the general decline of bodily functions. *Id.*, at 521.

As part of its consideration of the broad scope of loss of industrial use claims, this Court imposed a further restriction on such claims with its recent opinion. In addition to recognizing that they are separately identified in their own subsections, this Court ruled that the focus of specific loss is on anatomical loss or its equivalent, irrespective of wage earning ability, and that in contrast, the focus of total and permanent disability is on the loss of wage earning

capacity. Accordingly, this Court held that while the test for specific loss is an uncorrected test, the test for total and permanent disability is a corrected test.

Turning back in time for a moment, it was with the *Pipe* decision that the new term of "primary service in industry" was born. The term does not appear in the Act. The court in *Pipe* was asked to resolve the difficult situation where there was a claim for a specific loss of a hand where the hand was not anatomically lost, but instead was severely injured. The court made an effort to harmonize the purportedly divergent decisions that preceded *Pipe*, and during the process, utilized the terminology "primary service of the hand in industry." While the concurring opinion questioned why a previously well defined standard was given a new name (Coleman, Chief Justice, concurring, at 529) it was with this new name that litigants were given the opportunity to attempt to apply concepts clearly within the realm of "industrial loss of use" to specific loss claims. While there is no statutory basis to extend the doctrine of industrial loss of use to specific loss claims (the industrial loss of use is contained only in § 361(3)(g)) the true difficulty arises when the discussions addressing the loss of primary service and loss of industrial use become intertwined.

It might be noted that it was the decision of *Villanueva v. General Motors, Corp*, 116 Mich App 436; 323 NW2d 431 (1982), that intermixed the distinct concepts more seriously than had been done before. Perhaps in an effort to concisely summarize the concepts set forth in *Pipe, supra*, at page 444, the court in *Villanueva* set forth an annotation like description of the holding in *Pipe*, an annotation which does not even fairly describe the true holding in *Pipe*. The court stated that in *Pipe*, "the Michigan Supreme Court held that, for purposes of

awarding specific loss benefits, the loss of industrial use of the member is determined by the loss of the primary service of [the member] in industry'." While the basic doctrinal concepts as described in *Pipe* are not unsound, the court's summary of the holding in *Pipe* in the *Villanueva* decision is simply inconsistent with any reading of the statute. There is no specific loss claim as defined by the statute in terms of "loss of industrial use," and the purely circular definition of this concept as contained in the summary of *Pipe* in *Villanueva* was only made possible by the use of the new vernacular "primary service in industry."

The court in *Villanueva* went on to utilize the "primary service in industry" nomenclature to define a new test of what constitutes the loss of industrial use of the legs. While the basic fundamentals (when viewed in the proper statutory framework and in consideration of the case law describing the proper statutory language) is not too far astray, their choice of terminology is unfortunate and has resulted in significant confusion.

Shortly after the decision in *Villanueva*, this Court came forward with its decision in *Kidd v. General Motors Corp*, 414 Mich 578; 327 NW2d 265 (1982). As *Villanueva* was decided before this Court's opinion in *Kidd*, the court in *Villanueva* did not have the benefit of this Court's decision from 1982 in *Kidd*. The decision of *Kidd* set forth a more accurate description of the rule stated in *Pipe*. *Kidd, supra*, at page 586. The court also gave credit to the legislature for their knowledge of the significant medical advances continually being made when they inserted the time restriction in §361(3)(g), which requires that permanency be determined prior to 30-days before 500-weeks after the injury. *Id.*, at 590.

At about the same time, this Court released its decision of *Johnson v. Harnischfeger, Corp.*, 414 Mich 102; 323 NW2d 912 (1982). It was this decision that outlined that claims under § 361(2)(g) (now § 361(3)(g)) are medically, factually, and legally distinguishable from the anatomical loss claims listed in the other categories of § 361. As part of its discussion of *Redfern v. Sparks-Withington, Co.*, 403 Mich 63; 268 NW2d 28 (1978), the court in *Johnson* recognized that the loss of industrial use is a distinctive category, added to the total and permanent disability definition after its original formulation, with an entitlement to compensation for total and permanent disability. The court in *Johnson* went on to describe in detail how the proof or disproof of loss of industrial use is unlike that of specific loss. *Johnson*, at 116 and 117.

It is anticipated that counsel for Cain will argue that Defendants ask this Court to reverse the decision of *Pipe* . While this Court may wish to do so, the arguments of Defendant Waste Management do not dictate that outcome. Instead, this brief recognizes that this Court's prior decision in *Cain* calls into question the applicability of *Pipe* in those situations where specific loss benefits are sought under an exported theory of "loss of industrial use" and the injured worker is in fact able to use the injured limb in industry with medical aids or assistive devices. In other words, while the *Pipe* decision may have ongoing validity, it is simply not determinative in the present case.

This Court's clear pronouncement in its *Cain* opinion required the lower courts to distinguish between specific losses with their focus on *anatomical losses or its equivalent*, and total and permanent disability and its focus on the *loss of wage earning capacity*. Given the

clear delineation of the distinct tests for specific losses and losses of industrial use, the following conclusion should have been reached by the lower courts: To the extent that "loss of industrial use" has been adopted by the Michigan courts as the one of two tests for the determination of specific losses, the limitations imposed upon claims for the "loss of industrial use"(namely the recognition of medical aids and prosthetics) must be applied when the doctrine of "loss of industrial use" is applied in the specific loss context. In other words, to the extent that "loss of industrial use" is adopted as a test for specific losses, the limitations imposed by this Court's prior *Cain* decision, namely a corrected test, must also be applied.

On the other hand if the doctrinal concepts of the plain statutory language of 361(3)(g) are not allowed to be exported to cases under 361(2), and instead claims for specific losses are determined under the plain language of Section 361(2), namely anatomical losses or losses tantamount anatomical losses, there is no need to impose a corrected test. However, inconsistencies and erroneous outcomes (like that occurred here) will appear when the doctrine of "loss of industrial use" is borrowed from Section 361(3)(g) as a basis for finding specific losses under Section 361(2) without the imposition of the limiting doctrines imposed on claims under Section 361(3)(g) are not likewise imposed. The opinions of the Appellate Commission and the Court of Appeals demonstrate this error.

In order to resolve this issue, this Court could apply the Act as written, or alternatively, to the extent that "loss of industrial use" doctrines are exported from Section 361(3)(g) to cases for specific loss under Section 361(2), this Court could rule that the limitations imposed on claims under (3)(g) must likewise exported with the underlying exported doctrines.

The outcome of the Appellate Commission and Court of Appeals can only be reached if Plaintiff is allowed to pick and choose the application of the legal rules in question in a manner to maximize his claims. Plaintiff utilized the broad nature of a loss of industrial use claim while ignoring its concomitant restriction, namely, the corrected test imposed by this Court. Plaintiff must no be allowed to have it both ways, and the Court of Appeals must be reversed.

C. WHETHER THE COURT OF APPEALS MUST BE REVERSED AS PLAINTIFF FAILS TO MEET THE STATUTORY TEST FOR A SPECIFIC LOSS OF HIS LEFT LEG (ANATOMIC LOSS OR ITS EQUIVALENT), AND PLAINTIFF'S CLAIMS FOR THE SPECIFIC LOSS OF HIS LEG UNDER A "LOSS OF INDUSTRIAL USE" THEORY ARE MISPLACED GIVEN THE RULES ESTABLISHED BY THIS COURT'S PRIOR *CAIN* OPINION.

First, by applying the plain language of Section 361 of the Act and in light of this Court's distinctions in its *Cain* opinion, it is appropriate for this Court to determine that to establish a specific loss under Section 361(2) an anatomical loss or loss tantamount to an anatomical loss is required. Plaintiff does not assert the anatomical loss of his left leg. To the contrary, it is Defendant's understanding that his left leg is anatomically complete, with functioning muscles, nerves, blood supply. He can wiggle his toes. He can flex his leg and articulate his ankle. A claim for the specific loss of his left leg under the statutory definition must fail.

Likewise, Plaintiff does not claim his left leg has been amputated or otherwise destroyed; instead, he argues that he can't use the leg, without its brace, to perform labor. Even if Plaintiff is allowed to proceed on the basis of a "loss of industrial use" theory with

regard to the claimed "specific loss" of his left leg, the Appellate Commission and Court or Appeals must nevertheless be reversed. In light of this Court's directive on remand, it is apparent that the Appellate Commission and Court of Appeals erred to the extent that it adopted the magistrate's 1993 decision without regard to the changes in the legal framework which are determinative of the outcome in this case, including the imposition of the corrected test. Relying on pre-*Cain* authority, Magistrate Anderson's 1993 opinion stated, "Payment of specific loss benefits commences with the time that hope of restoring the member is abandoned. The loss must be tantamount to anatomical loss. I find it is so in this case." The Appellate Commission, approving of Magistrate Anderson's finding of a specific loss, stated, "The magistrate reasonably accepted the testimony that the injury to plaintiff's left leg equates with anatomical loss and that the limb retains no substantial utility." The Court of Appeals did not reflect on the Appellate Commission's opinion, but did endeavor to misconstrue Waste Management's arguments, and after doing so, suggest their mistaken conclusions establish defendants' arguments are "nonsensical and specious." The Court of Appeals opinion even contains a bewildering statement that demonstrates their misconstruction of Defendants' arguments, namely, "For instance, a double amputee would be denied total and permanent disability benefits." (Opinion of Court of Appeals, at page 9 attached as Exhibit 1) No rule of law suggested by Defendants would ever lead to such an outcome.

The careful distinctions of this Court's opinion in *Cain* make the legal errors of Magistrate Anderson, the Appellate Commission and the Court of Appeals in the above quotes clearly apparent. Again, there is no dispute that the left leg was not anatomically lost. Mr.

Cain has an anatomically complete left leg.[5] Accordingly, to the extent that Magistrate

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[5]Defendants refer this Court to testimony obtained for the initial trial of this matter. Dr. Sales testified with regard to Plaintiff's claims on February 8, 1993. She testified with regard to the use of his leg at page 18:

Q What's your advice to his as how often he should use that?
[brace]

A He should wear it when he is walking. He could have it off when he is sitting. **The Fractures heal**, the idea is the torque on the left lower extremity when he swings the right prosthesis through to walk for gait.

Q That is to help reduce the torque on the left leg?

A **It's just a little bit of a reassurance**. It's a support. It's the best we can do to give him a **little extra protection**.

[Emphasis added]

Dr. Mahaney, the examining doctor for these defendants, at page 26 of his deposition commented as follows:

Q Okay. Now if we look at the lower extremity from a strictly bio-mechanical/orthopedic standpoint, what is the function of or purpose of the lower extremities of the body?

A To allow you to stand upright. To allow you to get around; walking, running, climbing stairs. Working in an upright position. Also functions as a point or attachment for muscles to work foot controls on sewing machines, typewriters, what ever it happens to be depending on where you are.

Q Okay. Now in this particular man's case, **is he able to walk on his left lower extremity**?

A **Oh, yes, he walked in here and obviously he can**.

Q Okay. Would you agree or disagree with the statement that the primary function, the primary function of the lower extremities of the body would be to walk and to stand?

[Objection omitted]

A Yes.

[Emphasis added] In fact, Dr. Mahaney suggest on page 23 of his deposition the following:

Q Now with regard to now that you've had an opportunity to look at the x-rays of the left lower extremity, and recognizing that he has the prosthesis on the right, would you have an opinion based upon a reasonable degree of medical certainty whether or not he could, lets start with, stand on the left lower extremity absent the brace?

A Yes.

Q What is that opinion?

A **I think he can**.

Anderson referred to the "hope of restoring the member [being] abandoned," he can only have been referring to restoring the limb to unrestricted industrial use. Any finding of anatomical loss (or even equating the injury to the left leg to an anatomical loss, as stated by the Appellate Commission) is clearly misplaced. To the extent the Appellate Commission concluded "the limb retains no substantial utility," again, this can only be viewed in the context of whether the "industrial use" of the leg has been lost. Under the statutory test, such a consideration is irrelevant. Under the loss of industrial use version of a specific loss claim, said determination is clearly erroneous as Plaintiff was able to continue to use the leg in industry (with a brace). The judicially established scheme of applying "loss of industrial use" tests to claims involving specific loss under Section 361(2) requires the application of the limitations imposed by the decision in *Cain* involving the consideration of medical aids and other devices. Cain's actual use of his braced leg and his prosthetic leg formed the basis for the Supreme Court's decision above that braces and medical aids must be considered in claims for total and permanent disability, and thus the foundation for the remand that resulted in the present appeal on the single issue of whether Cain suffered the specific loss of his left leg. In effect, the opinions of the Appellate Commission and the Court of Appeals directly negates the this Court's opinion by ignoring its teachings and affirming the magistrate's 1993 opinion.

Q Now, with regard to the left lower extremity and the condition that you saw him on the x-rays, could he walk, recognizing the use of the prostheses on the left/ on the right/could he walk on the left lower extremity?

A **If the ground was not covered with snow and ice, if it was very flat and his footing good, yes.** As far as going a long distance, no. If it was out in a filed, like a farm field, something like that, no, he should have his brace on.

II. DEFENDANT WASTE MANAGEMENT'S ARGUMENT REGARDING THE ISSUES TO BE ADDRESSED AS ORDERED BY THIS COURT IN ITS ORDER GRANTING LEAVE TO APPEAL.

A. WHETHER THE "LOSS OF INDUSTRIAL USE" STANDARD MAY BE APPLIED TO CLAIMS OF SPECIFIC LOSS UNDER MCL 418.361(2).

This Court has directed the parties to answer the question as to whether or not the "loss of industrial use" standard may be applied to claims of specific loss under MCL 418.361(2). As discussed in greater detail above, Section 361(2) of the Act addresses "scheduled" or "specific" losses. Again, as discussed in greater detail above, the Act by way of its language alone does not provide for such losses on the basis of a "loss of industrial use." It is only by going beyond the text of the Act can the foundation for so-called "loss of industrial use" claim be established for purposes of showing a specific or scheduled loss pursuant to Section 361(2).[6]

It is anticipated that Plaintiff will carefully outline for this Court the evolution of this doctrine of loss of industrial use in the Michigan courts, and it can be further expected that Plaintiff will assert that given the long development of this doctrine and the fact that the legislature did nothing to legislatively overrule the doctrine, that the legislature has somehow acquiesced to the development of the doctrine. Plaintiff's Brief in Opposition to the Defendants' Application for Leave to Appeal stated that, "the phrase grew from infancy to adulthood in just such cases." (Cain's Brief in Opposition to Application for Leave to Appeal, dated December 22, 2003, at page 10) However while this doctrine may have "grown from

[6]Section 361(2) is likewise devoid of any mention of a "primary service in industry" test.

infancy" over the years, the arguments asserted by Plaintiff ask this Court to prematurely *stunt* the doctrines growth, and it will never reach "adulthood."

Again, there is no textual basis for a "loss of industrial use" claim in the text of the statute under Section 361(2). It is only by going to the case law that the foundation for such a claim can be found. Unfortunately, Plaintiff's arguments ask this Court to ignore its own prior decision in its Opinion from this very litigation from January of 2002, the Opinion which remanded the matter, leading to the present appeal. This Court distinguished claims under Section 361(2) from those under 361(3)(g) involving loss of industrial use, and this Court ruled that given the distinct purposes and legal tests involved, claims under (3)(g) utilize a "corrected" test. Plaintiff now asks this Court to ignore its prior teachings, and apply the theory of "loss of industrial use" in the specific loss context, without the limitations and requirements imposed by the Court in its earlier decision, for cases involving loss of industrial use.

This Court is now presented with at least three distinct options. The first option is to simply overrule the prior cases that assert that anything less than an anatomical loss is sufficient for a scheduled loss under Section 361(2). This would appear to be the outcome dictated by the plain language of the statute. The second option would be to rule that to the extent a "loss of industrial use" claim can be asserted in the context of the specific loss statute, Section 361(2), then the concomitant doctrines that are part of "loss of industrial use" claims (including the "corrected" test) must accompany the exported doctrine. The last option would be to adopt a test which requires the magistrate to address the factual situation on a case by

case basis, requiring the magistrate to address, among other things, the permanency of the injury, whether or not the injury is "repairable," and whether the employee can use the limb or body part with an assistive device.

To the extent that this Court does not make the determination that because of a lack of textual foundation for such a claim any prior cases reaching such a conclusion must be reversed, it would only be appropriate for this Court to recognize that to the extent that the loss of industrial use methodology is used in a "pure" specific loss claim under Section 361(2) than the concomitant doctrines (as outlined in this Court's prior *Cain* decision) must be applied. To the extent that the Court rules that it is appropriate for the magistrate to address the specific facts as to each asserted claim, it would be appropriate for the magistrate to address: (1) the nature and extent of the workers injury, (2) the permanency of the alleged injury, i.e. whether the injury might heal or be repaired, (3) the nature and extent of the impact of the injury's function on the limb both with and without any available medical assistive devices, and (4) whether the brace or assistive device is a mere aid or more akin to the replacement of affected body part.

It is the position of Defendant-Appellant Waste Management that to the extent that there is not a complete factual assessment made by the magistrate, and the magistrate simply rules that the injury was "serious" or by merely ruling that the injured worker will require some type of assistive device in the future is an <u>insufficient</u> inquiry as to whether or not the affected body part has been "lost" for purposes of Section 361(2). Magistrate Anderson's initial findings were devoid of any such analysis.

Again, there is no statutory basis for any of the above analysis, and it is only by continuing the evolution of a case law in Michigan (or by ruling it statutorily unsupported and in error) can the evolution of Michigan Workers' Disability Compensation Law keep in step with the medical advances and realities of the workplace. It is obvious that even a modest injury could be potentially disabling, but that at the same time, the modest injury could easily be ameliorated by a medical aid such that the worker is fully functional. In such cases, it would clearly be an injustice to rule that the affected body part has been "specifically lost" for purposes of Section 361(2).

The courts below, including Magistrate Anderson's initial opinion, clearly failed to make any detailed exploration as to Cain's abilities both with and without his brace, not any of the other factors suggested above. The opinions of the lower courts in this case demonstrate the shortcomings and pitfalls of any approach which strictly excludes consideration of medically assisted devices, or otherwise allows the magistrate to make a determination without a full assessment of the abilities of the injured worker both with and without the medical assistive device in question. An affirmative determination regarding the permanency of the injury and the "unrepairability" of the injury must be made by the magistrate. The underlying doctrines of a total and permanent disability claim (wage earning ability) cannot be ignored where the limb has not been anatomically lost and the worker has successfully returned to the workplace.

B. WHETHER *PIPE V. LEESE TOOL AND DIE CO.*, 410 MICH 510 (1981), SHOULD BE OVERRULED.

As discussed above in Waste Management's analysis of the question of whether a "loss of industrial use" standard is appropriate in a claim under Section 361(2), the difficulty is that to the extent that one departs from the plain language of the statute, one must rely solely on the evolving case law and the case law must be allowed to evolve to "stay synchronized" with medical developments and the economic realities of the workplace in the State of Michigan. Again, this Court's options are to overrule *Pipe*, its predecessors, and its progeny, or, to impose the controlling doctrines set forth in this Court's earlier *Cain* opinion, doctrines that recognize the extremely broad nature of a "loss of industrial use" claim (whether in the context of a total and permanent claim or not) and its distinct purposes and requirements, and the potential for mis-application or over-extension of the doctrine.

In essence, Plaintiff asserts that *Pipe* provides an exception to this Court's earlier Opinion in *Cain*, and somehow avoids the requirements imposed by that decision. To the extent that Plaintiff requests this Court apply a doctrine that evolved purely in the case law, Plaintiff must not be allowed to ignore the teachings of this Court in its earlier *Cain* opinion and adopt sundry doctrines on a willy nilly basis to maximize his recovery. Clearly, *Pipe* is not an exception to the doctrines stated in *Cain*.

C. WHETHER THE WCAC EXCEEDED THE SCOPE OF THIS COURT'S REMAND ORDER BY AWARDING PLAINTIFF TOTAL AND PERMANENT DISABILITY BENEFITS.

The argument that the WCAC exceeded the scope of this Court's remand has primarily been advocated by Co-Defendant, the Second Injury Fund (Total and Permanent Disability

Provisions). Defendant-Appellant Waste Management concurs in Co-Defendant's arguments, and adopts and asserts Co-Defendant's arguments here as its own.

It is further the position of Defendant Waste Management that the true problem is the mixing and matching of separate and distinct legal doctrines, namely claims for the "loss of industrial use" and claims for "specific" or "scheduled" losses. This problem is aggravated by the absence of a statutory basis for a "loss of industrial use" claim brought under Section 361(2), the scheduled loss subsection (which does not include the term "loss of industrial use" or otherwise provide this Court or any other court with any guidance as to its application). It is only when these doctrines are intermixed that the inconsistencies and problems complained of by Plaintiff arise.

The mixing of distinct doctrines and the absence of statutory basis for the doctrines results in a situation where questions as to the scope of the Court's remand become determinative. To the extent that this Court rules that the limitations on a loss of industrial use claim are applied whether brought under the context of a 361(3)(g) or 361(2) claim, the distinction is moot and the "scope of the remand" is not determinative. It is only when the anomalies complained of herein are allowed to continue and the scope of review in effect determines the controlling law that the difficulties arise. To the extent that this Court overrules *Pipe,* its predecessors and its progeny, the issue of scope of remand would become moot and there would be no legal basis for a loss of industrial use claim under Section 361(2), and further remand would not be necessary. The lower court's opinions should simply be found in error, reversed, and that total and permanent disability benefits must be denied.

To the extent that this Court determines that the legal doctrines of scheduled losses and loss of industrial use claims were mixed on a willy nilly basis, the clarification of the application of the controlling legal principles will result in either the reversal of the lower court on a legal basis, or a further order from this Court remanding the matter for a determination consistent with this Court's anticipated opinion.

D. WHETHER TOTAL AND PERMANENT DISABILITY BENEFITS UNDER MCL 418.361(3)(B) (LOSS OF BOTH LEGS) MAY BE AWARDED ON THE BASIS OF PLAINTIFF'S SPECIFIC (ANATOMICAL) LOSS OF ONE LEG AND HIS SPECIFIC (INDUSTRIAL USE) LOSS OF THE OTHER LEG.

Again, there is no textual basis for total and permanent disability in Section 361(3)(b) for a claim that combines an anatomical loss with the "loss of industrial use" for the second limb. The subsection questions simply states:

> (3) Total and permanent disability, compensation for which is provided in § 351 means: . . .(b) loss of both legs or both feet at or above the ankle. . .

It is apparent from the plain text of the statute that only anatomical losses are contemplated. There are other subsections of the Act that contemplate losses less than complete anatomical losses (such as "paralysis" in Section 361(3)(e) and "loss of industrial use" in (3)(g)). Subsection (b) contains no other qualifiers or other words that would suggest anything less than an anatomical loss as sufficient to satisfy Section 361(3)(b).

To the extent that this Court does not adopt the rule that only an anatomical loss is sufficient for purposes of 361(3)(b), it is necessary for this Court to turn to the case law that has interpreted this subsection over the years. To the extent that this Court deems it appropriate to go forward with the endeavor of reviewing this case law, it is only appropriate to temper

the earlier decisions in this area of the law with the teaching of this Court's prior decision in *Cain*. In other words, to the extent that any notion of "loss of industrial use" is allowed to pervade other subsection of the Act (subsections are devoid of any reference to "loss of industrial use") the concomitant doctrines, including the corrected test, must accompany the exported doctrines. As discussed throughout this brief, the pivotal issue is the uniform application of the "loss of industrial use" doctrines, particularly to the extent that the doctrines are exported to subsections of the Act that contain no textual reference to "loss of industrial use."

CONCLUSION

Notwithstanding this Court's opinion regarding the differences between total and permanent disability based on loss of industrial use as distinguished from a specific loss claim, the Appellate Commission and Court of Appeals have nevertheless confused the standards, mis-applied the controlling legal tests, and reached the wrong outcome. The Appellate Commission failed to even identify which subsection of Section 361 they purportedly granted benefits.

Given the fact that Plaintiff has not suffered the anatomic loss of his left leg (which he can move, has range of motion, feeling, enervation, and circulation), it is only by applying some derivation of the loss of industrial use standard that a specific loss can be found. Claims for loss of industrial use are much broader than claims form anatomical loss, have distinct purposes, and have special restrictions as discussed above, including the corrected test imposed by this Court. Litigants must not be allowed to choose willy nilly from the various

doctrines to formulate a hybrid claim that is inconsistent with the plain language of the Section 361 and the purpose and intent of the Act.

RELIEF REQUESTED

Defendants request this Court to reverse the Court of Appeals decision and to deny Plaintiff's claim for the specific loss of his left leg for the reasons stated in this brief, plus any such additional relief as this Court may deem just.

Respectfully submitted,

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